Polk Bros. Concrete Products *and* Teamsters Local Union #515. Cases 10-CA-15593 and 10-CA-15611

June 22, 1981

DECISION AND ORDER

On January 22, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Polk Bros. Concrete Products, Tunnel Hill and Resaca, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.[2]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Inasmuch as the Administrative Law Judge rejected as specious Respondent's defense that Donnie Kimbrel was discharged for missing a day's work, Member Jenkins would not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: A hearing in this proceeding was held on October 2 and 3, 1980,[1] at Dalton, Georgia. The charges in Cases 10-CA-15593 and 10-CA-15611 were filed by Teamsters Local Union #515, herein called the Union, on March 12 and 17, respectively, alleging that Polk Bros. Concrete Products, herein called the Respondent or the Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act. An order consolidating cases, complaint, and notice of hearing issued on April 21 alleging that the Respondent independently violated Section 8(a)(1) of the Act by various acts and statements of its supervisors and agents, including, *inter alia*, unlawful interrogation of employees, unlawful promises of benefits to employees to encourage them to refrain from union activities, unlawful threats of discharge or layoffs for union activities, and the creation among its employees of an impression of surveillance of their union activities. The complaint further alleges violations of Section 8(a)(3) and (1) of the Act by the Respondent in the discharge of employees Harold Gordon on February 11 and Don Kimbrel on March 5 because of their union activity.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Georgia corporation with offices and places of business located at Tunnel Hill and Resaca, Georgia, where it is engaged in the manufacture and sale of concrete products. During the calendar year preceding issuance of the complaint herein the Respondent sold and shipped products valued in excess of $50,000 directly to customers located outside the State of Georgia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION STATUS OF THE UNION

The complaint alleges, the Respondent by its answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED 8(A)(1) VIOLATIONS

A. *Background*

There is no dispute that organizational activity on behalf of the Union among the Respondent's employees began in middle or late January. There is also no dispute that such activity was initiated and promoted by David Claridy, the Respondent's plant manager at its Tunnel Hill operation and an admitted supervisor within the meaning of the Act. On Sunday, January 27, Claridy disclosed to Jimmy Polk, president of the Respondent, the existence of the union activity but failed to disclose his own involvement. The revelation of the union activity to Jimmy Polk resulted in a rather swift response.[2] On the day following the revelation Polk called employees together at the Tunnel Hill plant and forcefully related his opposition to the union organizational efforts. His remarks in this regard provide the basis for the allegation of the initial 8(a)(1) violations.

[1] All dates are in 1980 unless otherwise stated.

[2] Claridy's disclosure was followed sometime later by the Union's letter claiming representation of a majority of the Respondent's employees and demanding recognition. Neither the language of the letter nor the exact date of its receipt by the Respondent was established in the record.

B. *The Statements and Conduct of Jimmy Polk*

It was the testimony of former employee Harold Gordon that Jimmy Polk told the employees at Tunnel Hill at the meeting on the morning of January 28 that he had received a letter from the Teamsters claiming that all the employees wanted a union, but that he would not stand for it. Jimmy Polk emphatically stated that he would not sign a "damn union contract." Polk also threatened, according to Gordon, that he would "have the wheels put under this plant and have them shipped back over to Africa or wherever it come from." Gordon commented that the employees would not need a union if the Respondent would give each employee 25 to 50 cent an hour more each time the Respondent went up on its concrete. However, Polk responded that he could not guarantee the employees a raise at that time but said, "I will up and do the best of my ability."[3] During the meeting Polk made a scratch across the floor and said for the "boys that were going to work to step across the line, and the ones that didn't to stay put."

Jimmy Polk admitted in his testimony that in the Tunnel Hill meeting with employees he told them that he did not think the Union would benefit the Company and that it would put them out of business. Polk also conceded that he had told the employees that he would not sign a contract with the Union.

Gordon was not an impressive witness. He appeared confused regarding the sequence of events and the timing of statements. It was necessary for the General Counsel to elicit a major part of Gordon's testimony using leading questions. Finally, Gordon admitted to a poor memory, and conceded that there were "a lot of times that I can't even tell you what I done last week."

Notwithstanding what I regard as Gordon's poor testimonial demeanor and bad recollection, the specific remarks he attributed to Jimmy Polk were not specifically denied, and at least one such remark concerning not signing a contract was admitted by Polk. Accordingly, I credit that portion of Gordon's testimony set forth above regarding Jimmy Polk's remarks to the Tunnel Hill employees.

Based upon Gordon's testimony and Jimmy Polk's admission, I conclude as alleged in the complaint that Jimmy Polk threatened employees that it would be futile for them to select the Union since the Respondent would never sign a contract with the Union. Moreover, I conclude that Polk's other remark to the employees about sending the plant to Africa constituted a threat to close the plant. Finally, while Polk's conduct in scratching a line on the floor and asking those employees who wanted to work to cross it was somewhat ambiguous, in the absence of explanation I conclude that in the context related by Gordon the act was a form of interrogation as argued by the General Counsel. Employees failing to cross the line risked identification as union supporters. Jimmy Polk's remarks and conduct in the foregoing respects constituted violations of Section 8(a)(1) of the Act.

C. *The Statements and Conduct of Bobby Polk*

The violations of Section 8(a)(1) of the Act attributed to Bobby Polk, the Respondent's vice president and secretary who had primary responsibility for the Respondent's Resaca operation, were related by former employee Donnie Kimbrel. Kimbrel testified that at a meeting of employees at the Resaca plant Bobby Polk told the employees that a union would not come in at the Company, that the employees were wasting their time bringing the Union in because he would shut the gates and sell the equipment before he would see it go union, and that he could not afford a union there. Kimbrel exhibited considerable confusion as to when Bobby Polk made these remarks and indicated that they took place in early January and before he signed a union authorization card on January 24. Bobby Polk, on the other hand, admitted that he had a meeting with the Resaca employees concerning the Union, but placed the meeting on the day after he learned of the union campaign on Sunday, January 27. Because of Kimbrel's confusion and since it is likely that Bobby Polk's meeting with the Resaca employees would have occurred at or about the same time as Jimmy Polk's meeting with the Tunnel Hill employees, I conclude that Bobby Polk's remarks were made to the Resaca employees in late January.

With respect to the substance of his remarks to the employees, Bobby Polk testified that he told the employees that he was afraid that the Union would "put us out of business." According to Polk, who was admittedly acting without benefit of legal counsel at the time, the employees were told that he did not feel like the Union would be good for the employees in the Company because of competition from other nonunion concrete companies. In spite of his confusion as to the timing of events and statements, Kimbrel appeared basically sincere in his testimony. Accordingly, and because Bobby Polk failed to deny the specific remarks attributed to him by Kimbrel, I credit Kimbrel's testimony and conclude that the Respondent through Bobby Polk unlawfully threatened employees at Resaca with plant closure and impressed upon them the futility of their organizational efforts. Such conduct, I conclude, violated Section 8(a)(1) of the Act.

Kimbrel testified concerning another meeting between Bobby Polk and certain employees at Resaca in late January. In this meeting Polk, according to Kimbrel, stated the Union "wouldn't work" at the Company and there would never be a union there. Further, Kimbrel testified that Polk "wanted to know" who had attended the union meetings and how many had signed union authorization cards. Polk also stated that anybody who signed a union authorization card to bring in a union at Resaca "could be looking for another job."

Kimbrel also related that in early February Bobby Polk asked him to take a ride with him. During the ride

[3] It is undisputed that at some subsequent time not clearly established in the record, but approximated as early February by Jimmy Polk, Jimmy Polk read a statement to employees regarding a wage increase stating that a wage increase, consistent with past practice and what some of the employees had been told several weeks earlier, would be granted effective February 6. The amount of the raise was not disclosed to the employees and the money represented by the raise was not to be paid until the union issue was resolved. Polk's announcement regarding the wage increase was not alleged by the General Counsel to be a violation of the Act.

in Polk's vehicle the union matter was discussed[4] and Polk stated that the employees were wasting their time with the Union. He added that unions would never do the employees any good because he would close the gates and sell the equipment. During the ride Kimbrel explained to Polk why the employees were trying to organize. As they returned to the plant, Polk advised Kimbrel that there would be a "little something extra" on Kimbrel's paycheck, but he could not give it to him until "this Union business" blew over.

Finally, Kimbrel testified that in mid to late February Bobby Polk again talked to a group of employees at the Resaca plant and again told them that he would "close the gates and sell the equipment" before he would have somebody telling him how to run his business. Polk also referred to a union meeting the preceding Saturday and stated that he knew Kimbrel and three other employees, specifically, Lanny Shaw, Mike Parker, and Larry Nicholson, had attended the meeting and added that he knew what time they were at the meeting and what time they had come back from the meeting.

Bobby Polk did not specifically deny the above remarks attributed to him by Kimbrel. Rather, Polk testified that after his initial comments to the employees the day after he learned of the union activity he had no further communications with employees concerning the Union either individually or in a group. He admitted, however, that he did once take Kimbrel for a ride in late January or early February to discuss Kimbrel's tardiness in reporting to work. He denied discussing the Union with Kimbrel during the ride. Taking employees for such rides to discuss problems with them was in accord with his prior practice according to Polk.

I again credit Kimbrel's testimony regarding Bobby Polk's statements. Although Kimbrel's testimony set no standards for clarity and at times lacked detail, it was delivered in a manner sufficiently persuasive of honesty to overcome Bobby Polk's general denial. Polk's denial that he made any remarks regarding the Union to employees either individually or in a group after the day of his first admitted remarks strains credulity since it comes from a man who conceded that he considered the union activity as presenting a "life or death" threat to the Respondent's business existence. Accordingly, based on Kimbrel's testimony, I find that the Respondent through Bobby Polk violated Section 8(a)(1) by threatening employees with the futility of their organizational efforts, threatening employees with discharge for signing union authorization cards, interrogating employees concerning their union activities, creating the impression of the surveillance of such activities, and promising an employee a benefit to induce him to forego his union activity.

D. *The Statements and Conduct of David Claridy*

The Respondent admitted that David Claridy, its Tunnel Hill plant manager during the relevant times herein, was a supervisor within the meaning of the Act. Claridy, called by the Respondent, testified that he was involved in the union activity and, indeed, it was Claridy who initiated the union activity and obtained the blank authorization cards from the Union to distribute among the employees. Sometime after advising Jimmy Polk of the union activity (but not his own involvement), Claridy met with the Polk brothers and the labor counsel they had retained and learned of the legal ramifications of the union activity. Claridy testified that at this meeting a question was raised about a petition to "dispose of the Union." Counsel advised that such a petition would have to be handled by the people who would be eligible for the Union. Notwithstanding this information and knowing that he was acting contrary to advice of counsel and without instructions from the Polk brothers, Claridy proceeded to work up a crude handwritten "petition" and secured employee signatures thereon.

Claridy was not questioned further by either the Respondent or the General Counsel concerning the details of the initiation of the petition[5] or the circumstances under which it was signed by employees. Harold Gordon and his stepson, Marlon Michael, who apparently was not an employee of the Respondent, testified concerning the signing of the petition. Gordon testified that around February 7 following a union meeting at a restaurant employee Bruce Hampton asked the other employees to meet at his house. At Hampton's house Claridy talked to the employees and "came out" with this "petition." Claridy stated, according to Gordon, that he had talked to Jimmy Polk about the petition and that Polk would not fire anyone about the Union. Claridy added that he would try to help the employees out "about the raises" if they would drop the Union. Michael's testimony regarding Claridy's statements was ambiguous and vague. Michael related that Claridy said he was not getting along with Jimmy Polk and said something to the effect that he had been laid off.[6] Claridy added that he felt sorry for Jimmy because he was losing everything he had if the Union happened to get in and as he talked he began to cry. It was at that point that Claridy "came out" with the paper to sign to get the Union out.

The General Counsel argues that Claridy's initiation of the petition was, because of his supervisory position, an unlawful solicitation of employees to withdraw from the Union and that his reference to raises in connection with the petition was an unlawful promise of a benefit to employees to induce their withdrawal from the Union. While not disputing the facts related by Gordon and Michael with respect to Claridy and the "petition," the Re-

[4] Kimbrel's testimony was that "the question was brought up of why" the employees were trying to organize. He did not elaborate as to how the question was raised, and I find the record insufficient to establish that it was raised in the context of unlawful interrogation.

[5] The body of the "petition" (G.C. Exh. 4) contained the following language:

> We the undersigned agree to sign against the Teamsters Union below. We Do Not Want The Union. Also we want to keep our jobs, it is not legal for Jimmy & Bobby Polk to fire us for union activity. We understand all this before we sign. We do not want Union in our job.

At the bottom of the petition and following 14 employee signatures the following additional language was inserted:

> P. S. Guarateed [sic] meeting with all truck drivers to talk about guarateed [sic] raises and job security by Company.

[6] While Claridy subsequently left the employment of the Respondent, the Respondent through counsel at the hearing conceded that Claridy was still employed at the time of the "petition" signing.

spondent argues that Claridy was acting wholly in contravention to any express or implied authority of the Respondent and that his conduct with respect to the petition was an employee-recognized departure from his supervisory role. The Respondent, citing, *inter alia*, *M. C. Inc., d/b/a Poca Super Market*, 164 NLRB 1080 (1967), argues that the Board does not "saddle" the employer with a supervisor's aberrations in such situations.

In *Poca Super Market, supra*, a supervisor, as in the instant case, after first initiating a union organizational effort and obtaining signed union authorization cards, subsequently reconsidered and solicited employees to sign a revocation petition. The Board found that while the conduct of the individual involved, described as a minor supervisor by the Board, was violative of Section 8(a)(1), no remedial order was warranted. In so finding the Board noted that the employer was not aware of the supervisor's initial conduct in soliciting union cards and upon learning of it "manifested a completely neutral attitude" to the organizational efforts. Further, the Board found that the employer had no part in initiating or circulating the revocation petition. The facts in the instant case are distinguishable in several respects. First, Claridy as a plant manager cannot be regarded as a "minor" supervisor. Secondly, the Respondent never manifested its neutrality in the organizational efforts and, on the contrary, vehemently opposed it to the extent already found herein of threatening to close its operations and to refuse to ever sign a contract with the Union. Thirdly, even if Claridy's actions with respect to the revocation petition were contrary to specific Respondent instructions, it was clearly consistent with the Respondent's perceived threat to its existence as a result of the union activity. Moreover, from the employees' viewpoint Claridy was speaking for the Respondent because he referred to Jimmy Polk's loss of everything if the employees unionized and, by Gordon's uncontradicted testimony, intimated that he had talked to Jimmy Polk about the petition. The coercive impact of Claridy's conduct and remarks in connection with the petition, including his expressed intent to help out with the "raises," is crystal clear. Accordingly, I conclude, as alleged in the complaint, that the Respondent violated Section 8(a)(1) of the Act by Claridy's conduct and that a remedial order is warranted under the circumstances here.[7]

IV. THE ALLEGED 8(A)(3) VIOLATIONS

A. *The Separation of Harold Gordon*

Gordon had worked for the Respondent a number of times during the 4 years preceding his separation from employment on February 13, which is at issue herein. Gordon obtained union authorization cards from Claridy and distributed them to Donnie Kimbrel and signed a union card himself. He attended union meetings and, although he signed Claridy's revocation petition, he continued to speak out to employees in favor of the Union.

On the last day of his employment[8] by the Respondent Gordon reported for work and noticed that fellow employee David Latimer was not present. Gordon testified that he inquired of David Claridy about Latimer and Claridy told Gordon that Latimer had been discharged because of Gordon's pressing Latimer so much about the Union.[9] Thereafter, Gordon telephoned Jimmy Polk at Polk's office which was some distance from the Tunnel Hill plant and Gordon asked Polk if it were true that Latimer had been laid off due to Gordon's pressuring him about the Union. Polk, according to Gordon, did not answer, but asked Gordon to come to his office. Gordon went to Polk's office where he repeated his question about Latimer and Polk replied that it was true and that he could not have Gordon backing the Union so much and added that before he would put up with that he would lay Gordon off. Then Polk had his secretary type up a resignation for Gordon and told Gordon if he did not sign it he would not get his paycheck that week. Gordon got his paycheck and left. He subsequently filed an unemployment compensation claim contending that he had been laid off due to bad weather. According to Gordon, he was told by Polk at the time of his layoff that Gordon could not be given a separation notice because of the Union, but if he filed for unemployment compensation Polk would verify that he had been laid off.

The General Counsel contends that Gordon was discharged because of his union activity and support. The Respondent, on the other hand, contends that Gordon quit because he had recently moved to a new address in Tennessee which was approximately 50 miles from the Tunnel Hill plant making a long and expensive commute to work for Gordon. In support of its position the Respondent called several employees and former employees who testified about Gordon's actions and statements on the morning of February 13. Thus, David Claridy testified that when Gordon came in that morning Gordon inquired about Latimer and Claridy responded that Latimer had quit.[10] Upon receiving that information Gordon picked up the telephone and called Jimmy Polk. After finishing his conversation he slammed the phone down, got his timecard, and punched out. Claridy asked him where he was going and Gordon replied that he quit and left.

Claridy's testimony was generally corroborated by former employees Donald Hasting, Shane Bingham, and Melba Claridy, David Claridy's wife. Hasting specifically testified as to overhearing some of Gordon's remarks on

[7] The other cases cited by the Respondent in support of its position on Claridy's conduct, specifically, *B. N. Beard Co.*, 248 NLRB 198 (1980); *Dietz Forge Company of Tennessee*, 173 NLRB 19 (1968); *Redcor Corporation*, 166 NLRB 1013 (1967); and *Furr's Inc.*, 157 NLRB 387 (1966), are inapposite since the individuals whose conduct was in issue in those cases were found not to be supervisors at the time of the alleged transgressions or there was no evidence linking their conduct to the employers.

[8] Gordon testified that his last day was Monday, February 11. It is clear, however, that Gordon signed a resignation slip on his last day, and that slip, Resp. Exh. 8, is dated February 13. I conclude Gordon's testimony as to the date of his last day is in error.

[9] At another point in his testimony Gordon related he simply asked Claridy if Latimer had been laid off and Claridy's simple response was an affirmative yes.

[10] Claridy explained that Latimer had quit the day before stating that he could make more money in a business with his wife. A resignation slip signed by Latimer submitted in evidence by Respondent, Resp. Exh. 9, was dated February 11.

the telephone as he called Jimmy Polk that morning. According to Hasting, Gordon asked if he could be laid off. After he apparently received a negative response from the other party on the line Gordon responded, "Then I'll quit then," and slammed the phone down. Melba Claridy testified that when Gordon was told by someone on the morning of February 13 that Latimer quit, Gordon disagreed, and claimed that Latimer had been laid off and that he wanted the same. Hasting testified concerning Gordon's motivation with respect to quitting relating that Gordon had told him earlier that same morning that he would go to work somewhere else if he could find something closer to where he lived because he was having to drive too far.

Jimmy Polk testified that on the morning of February 13 Gordon telephoned him from the plant claiming that Polk had laid Latimer off and asking for a layoff himself. Polk refused to lay him off and Gordon responded that he quit. Polk asked him not to quit but to come to Polk's office. Thereafter, Polk met with Gordon for about 5 minutes and Gordon insisted he wanted a layoff. Polk refused and Gordon asked what had Latimer done. Polk explained that Latimer quit and Gordon said he was quitting. Polk asked Gordon to sign a letter of resignation since the Respondent was experiencing "this union problem" and he did not want to be accused of firing Gordon. Polk denied that there was any discussion about Gordon pressuring Latimer about the Union or holding up Gordon's paycheck if he did not sign the resignation letter. He could not recall whether Gordon's subsequent unemployment compensation claim ever came to his attention.

If Gordon's testimony is credited, a clear violation of a discharge for union activity is established. However, I have previously noted that Gordon was not an impressive witness. His testimony regarding the details of his separation from the Company was equivocal and illogical. There would have been absolutely no motivation for the Respondent to "lay off" or discharge Latimer because Gordon was pressuring Latimer about the Union. Gordon's own admissions served to undermine his testimony for not only did he admit on cross-examination to a poor memory, but he also conceded that he may have told Polk when he telephoned him from the plant that he wanted to quit or get laid off. Jimmy Polk's testimony regarding the meeting with Gordon on February 13 is more reasonable and logical than Gordon's in light of Gordon's announcement that he wanted to quit. Considering all the foregoing, including the testimony of Hasting, Bingham, and both Claridys, all of whom had little reason to prevaricate because none were employed by the Respondent at the time of the hearing, I conclude that Gordon's testimony cannot be credited where specifically contradicted on the details of his separation. I further conclude that he was not discharged but, in fact, quit. Accordingly, I find no violation of the Act in Gordon's separation from the Respondent.

B. *The Discharge of Donnie Kimbrel*

Donnie Kimbrel testified that he worked for the Respondent as a truckdriver off and on for a period of 3 years prior to his discharge on March 4, which is in issue herein. It is undisputed that Kimbrel was active in the Union's campaign and solicited a number of employees to sign union authorization cards. Kimbrel attended some union meetings and Bobby Polk's acknowledgement of such attendance has already been noted above.

It is undisputed that on February 28 Kimbrel experienced transmission trouble with his truck. He took it to the shop where he was told by the mechanic that it would be the following day before the work could be started. When Kimbrel came to work the following day, his truck was not ready and he related that he did not work. He was contradicted, however, by his timecard for February 29,[11] which shows that he did work 10 hours that day driving another vehicle.

Kimbrel testified that at some point he was told by Vaughn Jones, the manager at Resaca at the time, that Kimbrel would be called to work when his truck was ready. Kimbrel testified that he was not called to work on Monday, March 3, or Tuesday, March 4, but saw fellow employee Lowell Pinion driving his truck that Tuesday afternoon around 4:30 p.m. Tuesday evening, according to Kimbrel, Pinion telephoned him and stated that he had been assigned to the truck permanently. Since he knew his truck was drivable, Kimbrel reported in for work on Wednesday morning at 6:30 a.m. only to find that his timecard was missing. Kimbrel asked Vaughn Jones where his timecard was and Jones responded that Bobby Polk had "pulled" it. Kimbrel asked why and Jones said he did not have anything to do with it. The record shows no further contact or discussions between Kimbrel and any Respondent official concerning his separation. Kimbrel insisted that he had been at his home up until 4 p.m. on both March 3 and 4 awaiting a call from Jones but never received it. He explained an apparent contradiction by his prehearing statement submitted to the Board relating that he had waited for the Respondent's call up until 9 a.m. each day by saying he had waited in his house until 9 a.m. and then had worked on his car in his yard the remainder of the time until 4 p.m. each day.

The Respondent does not contest the fact that Kimbrel's card was "pulled." However, the Respondent through Bobby Polk contended that Kimbrel was not fired—he simply failed to show up for work. In this regard Bobby Polk testified that the Respondent had a rule that if employees had to be off work they were to call in by telephone, and if they did not Respondent "figured" they quit. In keeping with that rule, Polk "pulled" Kimbrel's card the evening of February 4.[12] Moreover, Polk related that Kimbrel had quit the Respondent on previous occasions by failing to report to work and Polk had "pulled" his card once before in 1978. Bobby Polk's testimony with respect to Kimbrel's employment history was generally corroborated by Vaughn Jones who

[11] Resp. Exh. 6.

[12] While Bobby Polk supplied no other examples of instances where employees' cards were "pulled" for not reporting to work, Jimmy Polk in his testimony named several employees as examples. However, from the limited details supplied by Jimmy Polk those named appeared to have either "laid out" for a period greater than 1 day and were discovered to have begun work for another employer or they reported for work and left shortly thereafter without notice and after being warned not to do so.

added, without contradiction from Kimbrel, that Kimbrel had stated several times that he was going to quit. Kimbrel himself admitted that he had on prior occasions quit employment with the Respondent by just not showing up.

Even if Kimbrel were terminated the Respondent argues that it was for cause based upon Kimbrel's failure to report for work on March 4 after having been previously told by Vaughn Jones to stand by to be called in when his truck was repaired and failing to report in when Jones telephoned Kimbrel's home the morning of March 4. In this regard Jones testified that Kimbrel had called him on March 3 to see if the truck was ready and Jones told him that it was not but that he would call Kimbrel the next morning between 7 and 7:30 a.m. The truck was ready the next morning and Jones testified he called Kimbrel's home and spoke to Kimbrel's wife. She reportedly replied that Kimbrel had left and she did not know when he would be back. Jones told her that Kimbrel's truck was ready and they needed it to go and to have Kimbrel call him as "quick as possible." Kimbrel did not thereafter phone or come in and employee Pinion was assigned to drive Kimbrel's truck.

Jones' testimony was corroborated by that of Pinion and David Nicholson who at the time of the hearing was serving as plant manager at Resaca replacing Jones who was transferred to Tunnel Hill. Both Pinion and Nicholson testified that they were present with Jones when he telephoned Kimbrel's home and heard Jones' comments to Kimbrel's wife. Kimbrel's wife was not called to testify by any party.

The General Counsel apparently takes the initial position that Jones never called Kimbrel's home the morning of March 4 and, thus, his termination for failing to report to work was a fabricated basis for discharging him. Alternatively, the General Counsel contends that even assuming Kimbrel's failure to report to work on March 4, the only "unpardonable sin" he had committed was his participation in union activities.

I find no merit in the General Counsel's initial position, for I find that the record fully substantiates that Jones made the call to Kimbrel's home on the morning of March 4. I base this finding on Jones' credible testimony supported by the equally credible testimony of Pinion and Nicholson that Jones made the call. Inexplicably, that testimony was not contradicted by the only person who could contradict it—Kimbrel's wife. Moreover, although what Mrs. Kimbrel reported to Jones as to Kimbrel's whereabouts may well have been hearsay as the General Counsel argues, the fact of Jones' contact with Mrs. Kimbrel and what he told her was clearly not hearsay. Nor were Mrs. Kimbrel's remarks to Jones hearsay to the extent that the Respondent acted upon them. Accordingly, I find and conclude that Kimbrel's failure to report to work on March 4, whatever the real reason for such failure, was not an offense fabricated purely by the Respondent.

Having found that Kimbrel did not in fact fail to report to work on March 4 does not preclude the existence of a violation in his termination, and I specifically conclude that he was terminated. Notwithstanding Kimbrel's prior employment history or even his expressions of an intent to quit at some unspecified time, the evidence does not establish that he had "quit." Indeed, Kimbrel credibly testified without contradiction that he had been absent before without calling in and his card was not "pulled." Specifically, Kimbrel related that he had been absent in August 1979 for 3 days without calling in and was not disciplined or terminated. And Kimbrel's appearance at the job on March 5 ready for work is obviously inconsistent with any intent to forsake his employment with Respondent.

Kimbrel's union activity, the Respondent's knowledge thereof, the Respondent's strong antiunion animus, and the Respondent's eagerness to accept Kimbrel's failure to report for work as a "quit" when in fact, as I have found, he did not quit, all establish the requisite *prima facie* showing sufficient to support the inference that Kimbrel's union activities were a motivating factor in his termination. The burden is thus shifted to the Respondent to show that Kimbrel would have been discharged even absent his union activity. *Wright line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). I am not satisfied that the Respondent has carried that burden.

The Respondent's contention that people who missed a day without calling in automatically had their timecards "pulled" is not fully supported by the record. On the contrary, it was contradicted by Bobby Polk's own testimony to the effect that Kimbrel had missed 2 days in late February without calling in. Obviously Kimbrel was not fired then so the Respondent's reliance on any hard and fast rule about "pulling timecards" in such situations is misplaced. The late February absences of Kimbrel do raise the question of why the Respondent did not seize upon them to effectuate a discriminatory discharge if it was so inclined. The answer to that question may be revealed in the failure of the record to affirmatively establish that either of the Polks was personally aware of such absences. In any event, I do not deem the failure to act against Kimbrel on these prior absences as evidencing any absence of discriminatory motivation in his subsequent discharge.[13]

The Respondent's failure to clearly establish that timecards were automatically "pulled" for employees who failed to appear for work without calling in obviously indicates an ulterior motivation in Kimbrel's card being pulled on March 4. The likelihood of such motivation is increased by the admission of Bobby Polk that Kimbrel's work was sufficiently acceptable to reemploy him on previous occasions in the past notwithstanding Kimbrel's having quit in the past without notice.[14] This history of

[13] Kimbrel had signed Claridy's petition to withdraw from the Union in early February. This too would seem to undermine any finding of discriminatory motivation against Kimbrel. However, neither Jimmy nor Bobby Polk claimed to have knowledge of the petition or the names thereon. The absence of such a claim is explained by Claridy's testimony that he never advised the Polks about the petition until a month or two after the fact. From Kimbrel's credited testimony it also appears that Bobby Polk had continued in his antiunion comments at times after the signing of the petition.

[14] Bobby Polk conceded that notwithstanding Kimbrel's employment history, including the separation which was litigated herein, he would give "strong" consideration to Kimbrel's reemployment if Respondent had an "opening." Although this concession was an obvious self-serving

Continued

employment of Kimbrel coupled with the absence of any showing of the hiring of any new employees prior to March 5 when Kimbrel reported to the job establishes in my opinion that Kimbrel's card would not have been "pulled" but for some ulterior motivation. I am persuaded on the evidence found herein of the Respondent's strong antiunion animus that such ulterior motivation was based upon Kimbrel's union support. I find that the Respondent has not established that Kimbrel would have been discharged without regard to his union activities and I conclude that his discharge was therefore discriminatory within the meaning of Section 8(a)(3) and (1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent Polk Bros. Concrete Products, Tunnel Hill and Resaca, Georgia, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union #515 is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their union activity and support, by soliciting employees to sign a petition withdrawing their support from the Union, by promising employees benefits in order to induce them to forego their union activity, by threatening employees with plant closure or sale should they select the Union as their bargaining representative, by threatening employees that it would never sign a collective-bargaining agreement with a union and otherwise expressing to employees the futility of their organizational efforts, by threatening employees with discharge for signing union authorization cards, and by creating the impression among employees of surveillance of their union activity, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Donnie Kimbrel on March 4, 1980, the Respondent engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act as alleged in the complaint except to the extent noted above in paragraphs 3 and 4.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including the reinstatement of Donnie Kimbrel, and making him whole for any loss of earnings, in order to effectuate the policies of the Act. Backpay and interest thereon is to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[15]

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Polk Bros. Concrete Products, Tunnel Hill and Resaca, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of activities on behalf of Teamsters Local Union #515 or any other labor organization.

(b) Coercively interrogating employees concerning their activity or support of the above-named Union or any other labor organization.

(c) Unlawfully soliciting employees to sign a petition withdrawing their support of the above Union or any other labor organization.

(d) Promising employees benefits in order to induce them to forego their union activity.

(e) Threatening employees with plant closure or sale if they select the above Union or any other labor organization to represent them.

(f) Threatening employees that it would never sign a collective-bargaining agreement with the Union or otherwise advising employees that their organizational efforts will be futile.

(g) Threatening employees with discharge for signing union authorization cards.

(h) Creating among employees the impression that it has their union activities under surveillance.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Offer to Donnie Kimbrel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge by the Respondent in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

attempt to show the absence of discriminatory concern over Kimbrel's employment, I construe it as a further demonstration of the Respondent's general satisfaction with Kimbrel's job performance which makes his discharge under all the circumstances here all the more suspect.

[15] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its plants in Tunnel Hill and Resaca, Georgia, copies of the notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days of the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed in all other respects.

[17] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives whom they select
To engage in activities together for purposes of collective bargaining or to act together for common interests or protection
To refuse to participate in any or all of these activities.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of Teamsters Local Union #515, or any other labor organization.

WE WILL NOT unlawfully solicit our employees to sign a petition withdrawing their support of the above Union or any other labor organization.

WE WILL NOT promise employees benefits in order to induce them to forego their union activity.

WE WILL NOT threaten employees with plant closure or sale if they select the above Union or any other labor organization to represent them.

WE WILL NOT threaten our employees that we will never sign a collective-bargaining agreement with the Union or otherwise advise employees that their organizational efforts will be futile.

WE WILL NOT threaten our employees with discharge if they sign union authorization cards.

WE WILL NOT create among our employees the impression that we have their union activities under surveillance.

WE WILL NOT discharge or otherwise discriminate against employees because of their activities on behalf of the above Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL offer Donnie Kimbrel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discharge of him, with interest.

POLK BROS. CONCRETE PRODUCTS